

July 28, 2005

Guadalupe Alvarez
246 Egret Lane
Guadalupe, CA 93434

**Re: Your Request for Informal Assistance
Our File No. I-05-134**

Dear Mr. Alvarez:

This letter is in response to your separate requests for advice dated June 14, 2005 and July 8, 2005, regarding the conflict of interest provisions of the Political Reform Act (the "Act").¹ Informal assistance does not confer the immunity provided by a Commission opinion or formal written advice. (Regulation 18329(c)(3), copy enclosed.)

Your letter of June 14, 2005 seeks advice on the duties of another city council member. Please note that the Fair Political Practices Commission (the "Commission") does not provide third party advice. Therefore, nothing in this letter should be construed to apply to another person's duties under the Act. (Section 83114(b); Regulation 18329(b)(8), enclosed.).

QUESTION

As mayor of the city of Guadalupe, may you participate in decisions involving proposed changes to Highway 1 when you own property located within 500 feet of the highway?

CONCLUSION

It is presumed that the financial effect of the Highway 1 decisions on your property is material. Therefore, unless rebutted, you are presumed to have a conflict of interest and may not participate in this decision.

¹ Government Code sections 81000 – 91014. Commission regulations appear at Title 2, sections 18109-18997, of the California Code of Regulations.

FACTS

A child was injured by a passing vehicle while he was crossing State Highway 1, which runs through the heart of your city. As a result, Cal Trans is now ready to propose some changes to Highway 1, in an effort to make it safer for pedestrians and motorists.

You are the mayor of the city of Guadalupe and you own property that is within 500 feet from Highway 1. You wish to know if you may participate in decisions involving the proposed changes to the highway, such as the addition of crosswalks, in an effort to make it safer for pedestrians and motorists.

ANALYSIS

Conflict-of-Interest Prohibition: Section 87100 prohibits any public official from making, participating in making, or otherwise using his or her official position to influence a governmental decision in which the official has a financial interest.

A public official has a “financial interest” in a governmental decision within the meaning of the Act, if it is reasonably foreseeable that the governmental decision will have a material financial effect on one or more of the public official’s economic interests. (Section 87103; regulation 18700(a).) The Commission has adopted a standard eight-step analysis for deciding whether an individual has a disqualifying conflict of interest in a given governmental decision. (Regulation 18700(b)(1)-(8).)

1 & 2: Are you considered a “public official” and will you be making, participating in making, or influencing a governmental decision?

The conflict-of-interest provisions of the Act pertain only to public officials. A public official includes “every member, officer, employee or consultant of a state or local government agency . . .” (Section 82048; regulation 18701(a)(1).) As mayor, you are an elected member of the city council, and thus a public official subject to the Act’s conflict-of-interest provisions.

A public official “makes a governmental decision” when the official, acting within the authority of his or her office or position, votes on a matter, obligates or commits his or her agency to any course of action, or enters into any contractual agreement on behalf of his or her agency. (Regulation 18702.1.)

You will “make a governmental decision” if you vote on any issue obligating the city with respect to decisions involving proposed changes to Highway 1. In addition to actually voting on this matter, if you engage in negotiations without significant substantive review, provide advice or make recommendations, you will be “participating” in a decision (Regulation 18702.2). You will also be “influencing” that decision if you appear before or otherwise attempt to influence any member, officer, employee or consultant of the agency. (Regulation 18702.3.)

Recusal Requirements:

If a public official enumerated in section 87200 (including city council members) has a conflict of interest in a decision noticed at a public meeting, then he or she must: (1) immediately prior to the discussion of the item, orally identify each type of economic interest involved in the decision as well as details of the economic interest, as discussed in regulation 18702.5(b)(1)(B), on the record of the meeting; (2) recuse himself or herself; and (3) leave the room for the duration of the discussion and/or vote on the item. For closed sessions, consent calendars, absences and speaking as a member of the public regarding personal interests, special rules found in regulation 18702.5 (copy enclosed), subdivisions (c) and (d) apply. (Section 87105). Since you are a mayor, a position enumerated in Section 87200, these requirements apply to you.

You asked in a separate letter dated July 8, 2005, whether you may leave open a door that leads to the city council chambers so you may hear deliberations of city council members after you recuse yourself from a vote on an item due to a disqualifying conflict of interest. The language in regulation 18702.5(b) requires an official to “leave the room.” The regulation does not expressly impose any other obligations. However, local rules may restrict the official’s ability to observe the proceedings of an open meeting once outside the room. Moreover, there are special rules for closed session described in regulation 18702.5(c), which is enclosed. We have also enclosed the informational pamphlet “Can I Vote?” to provide you with further assistance regarding your obligations under the Political Reform Act.

3. What are your economic interests?

Section 87103 provides that a public official has a “financial interest” in a governmental decision if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official, a member of his or her immediate family, or on any of the official’s economic interests, described as follows:

- An economic interest in a business entity in which he or she has a direct or indirect investment of \$2,000 or more (Section 87103(a); regulation 18703.1(a)); or in which he or she is a director, officer, partner, trustee, employee, or holds any position of management (Section 87103(d); regulation 18703.1(b));
- An economic interest in real property in which he or she has a direct or indirect interest of \$2,000 or more (Section 87103(b); regulation 18703.2);
- An economic interest in any source of income, including promised income, which aggregates to \$500 or more within 12 months prior to the decision (Section 87103(c); regulation 18703.3);

- An economic interest in any source of gifts to him or her if the gifts aggregate to \$360 or more within 12 months prior to the decision (Section 87103(e); regulation 18703.4);

In addition, a public official always has an economic interest in his or her personal finances, including those of his or her immediate family -- this is the “personal financial effects” rule (Section 87103; regulation 18703.5, enclosed).

Real Property Interest:

You state that you “own property that is within 500 feet from Highway 1.” Provided that you have a direct or indirect interest worth \$2,000 or more in this property, you will have an economic interest in this property for purposes of disqualification under sections 87100 and 87103.

You have *not identified* other economic interests such as sources of income or businesses you may own, therefore we do not include them in our analysis, but point out that you must still determine whether a conflict of interest will arise from any of them (i.e., whether it is reasonably foreseeable that the governmental decision you participate in will result in a material financial effect on any of these economic interests).

4. Is your economic interest directly or indirectly involved in the governmental decision?

The general rule is that an official’s real property is considered to be directly involved in a decision if it meets any of the criteria in regulation 18704.2(a) (enclosed). This regulation states that real property (in which the official has an interest) is directly involved in a governmental decision when it is “located within 500 feet of the boundaries (or the proposed boundaries) of the property which is the subject of the governmental decision.” (Regulation 18704.2(a)(1).)

Therefore, your property which is within 500 feet of Highway 1 – an area which is the subject of a governmental decision – would be deemed directly involved, unless an exception applies. (*Brodsky* Advice Letter, No. A-03-259.)

5. Applicable Materiality Standard

A conflict of interest may arise only when the reasonably foreseeable impact of a governmental decision on a public official’s economic interests is material. (Regulation 18700(a).)

Regulation 18705.2(a)(1) provides that the financial effect of a governmental decision on real property which is directly involved in the governmental decision is presumed to be material. This presumption may be rebutted only by proof that it is not reasonably foreseeable that the governmental decision will have *any* financial effect on

the real property. Therefore, you may not participate in the decisions with respect to safety changes to Highway 1 if these decisions will have any financial effect at all – even a penny -- on your real property interest.

6. Foreseeability

Whether the financial consequences of a decision are reasonably foreseeable at the time a governmental decision is made depends on the facts of each particular case.

As used here, “reasonably foreseeable” means “substantially likely.” (Regulation 18706; *In re Thorner* (1975) 1 FPPC Ops. 198.) A financial effect need not be a certainty to be considered reasonably foreseeable; a substantial likelihood that it will occur suffices to meet the standard. On the other hand, if an effect is only a mere possibility, it is not reasonably foreseeable. (*Ibid.*)

It is assumed that any financial effect of a governmental decision on real property that is directly involved in the governmental decision is material. Therefore, you may not participate in decisions involving public safety measures on Highway 1, unless you can rebut this presumption or unless the public generally exception applies.

Please note that the Commission does not act as a finder of fact when providing advice (*In re Oglesby*, (1975) 1 FPPC Ops. 71.). Therefore, the determination of whether or not it is reasonably foreseeable that the applicable materiality standard will be met, is necessarily a factual question that is ultimately for you to decide.

7 & 8: The Public Generally and Legally Required Participation Exceptions.²

An official who otherwise has a conflict of interest in a decision may still participate under the “public generally” exception. This exception applies when the financial effect of a decision on a public official’s economic interests is substantially the same as the effect on a significant segment of the public. (Regulation 18707.1, copy enclosed.) For instance, in the *Brodsky* letter, 25 percent of all houses in the city were within 500 feet of a boulevard where the decisions involved pedestrian and auto safety issues. You should examine whether this regulation may apply to your situation and the particular governmental decision that may come before you.

Segmentation: In addition, we have previously advised that large and complex decisions may, under certain circumstances, be divided into separate decisions so that an official who has a disqualifying interest in one component of the decision may still participate in other components in which the official has no financial interest. (*Sansone*

² The “legally required participation” rule applies when the official’s participation in a governmental decision is legally required. (Section 87101; regulation 18708.) Since you have not asked about this exception, we do not discuss it in this letter.

Advice Letter, No. I-03-058; regulation 18709, enclosed.) Thus, if any of the decisions you describe can be segmented into smaller, more specific decisions which do not have reasonably foreseeable material financial effects upon your property, you may be able to participate in these more specific decisions, provided that you do not have a conflict of interest in those decisions.

For example, if decisions regarding locations of the crosswalks are made without your participation, you may be able to participate in subsequent decisions involving Highway 1 provided you have no other conflict of interest in these subsequent decisions and those decisions will not affect the decision for which you did have a conflict of interest. However, we do not have enough information to determine whether segmentation applies in your case.

If you have any other questions regarding this matter, please contact me at (916) 322-5660.

Sincerely,

Luisa Menchaca
General Counsel

By: Emelyn Rodriguez
Counsel, Legal Division

Enclosures

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